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**APR 21 1997**

Federal Communications Commission  
Office of Secretary

April 21, 1997

Hand Delivery

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, DC 20554

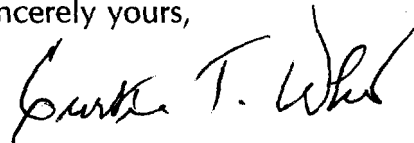
Re: WT Docket No. 97-81

Dear Mr. Caton:

Enclosed are an original and four copies of the Comments of East Bay Municipal Utility District, to be filed in the above-captioned proceeding. Also enclosed are two additional copies for the public file.

Please date stamp our file copy as an acknowledgement of receipt, and kindly contact the undersigned should you have questions or require additional information.

Sincerely yours,



Curtis T. White

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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APR 21 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
Amendment of the Commission's Rules ) WT Docket No. 97-81  
Regarding Multiple Address Systems )

INITIAL COMMENTS OF EAST BAY MUNICIPAL UTILITY DISTRICT

On February 27, 1997, the Federal Communications Commission ("Commission") released its *Notice of Proposed Rule Making* ("NPRM") in the above-captioned proceeding. This NPRM deals broadly with an array of issues related to the Commission's proposed amendment of rules and procedures governing the licensing of multiple address systems ("MAS"). The NPRM seeks comment on various matters, including geographic areas of license, establishment of new categories for certain MAS spectrum, and treatment and/or protection of incumbent licensees. East Bay Municipal Utility District ("EBMUD") hereby offers its Initial Comments on certain proposals contained in the NPRM.

I. INTRODUCTION

The Commission has initiated this proceeding in order to facilitate the efficient use of spectrum, promote the development of new competitive telecommunications services, and eliminate unnecessary regulatory burdens.<sup>1</sup> It also proposes to implement competitive bidding procedures for specified MAS frequencies pursuant to auction authority contained

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<sup>1</sup> NPRM at ¶ 1.

in Section 309(j) of the Omnibus Budget Reconciliation Act of 1993 ("OBRA")<sup>2</sup>

The seminal rules governing MAS operations were established in the early 1980's in Commission Docket 79-18. Because there was limited experience upon which to base point-to-multipoint rules, the Commission there established general rules for frequency tolerance and general operation.<sup>3</sup>

A further Notice of Proposed Rule Making was issued in 1987, PR Docket No. 87-5.<sup>4</sup> The purpose of the further inquiry was to undertake a comprehensive review of rules governing MAS operations, precipitated in large part by the number of petitions filed with the Commission regarding MAS services, and requests for changes in certain aspects of the then existing rules.<sup>5</sup> Additionally, and as the Commission acknowledged, MAS service was developing differently than originally predicted.<sup>6</sup> For these and other reasons, the

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<sup>2</sup> Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, ("1993 Budget Act"), codified at 47 U.S.C. § 309.

<sup>3</sup> Amendment of the Commission's Rules to Reallocate Forty Eight 25 kHz Channels in a Certain MHz Range for Multiple Address Radio Systems; and to Establish a New Standard for Frequency Tolerance on Specific MHz Multiple Address Channels, SS Docket No. 79-18, *Report and Order*, 46 Fed. Reg. 9,950 (January 30, 1981).

<sup>4</sup> Amendment of §§ 22.501(g)(2) and 94.65(a)(1) of the Rules of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies (RM-5206), Amendment of §94.65(a)(a) of the Rules to Revise Footnote 3 in the Frequency Table to Make the Frequencies Available for use by any Part 94 Eligible (RM-5362), Amendment of Part 2 and §§ 94.63(d)(5) and 94.65(a)(1) Footnote 3 of the Rules to Permit Operation of Mobile Remote Meter Reading Systems on a Primary Basis on the Exclusive Power Radio Service Frequencies in the 952.3625-952.8375 MHz Band(RM-5178), Amendment of Part 94 of the Rules to Permit Intrasystem Communications Among Multiple Address System Master Stations (RM-5383), PR-Docket No. 87-5, *Report and Order*, 3 FCC Rcd 1564 (1988).

<sup>5</sup> See *Id* at ¶ 2.

<sup>6</sup> See *Id* at ¶ 4.

Commission concluded it appropriate to reexamine all of the then existing rules and policies governing MAS operations and services.<sup>7</sup>

Based on the record, and in an effort to meet the growing demand for MAS frequencies, the Commission adopted revisions in its PR Docket No. 87-5 under the broad objective of enhancing overall spectrum efficiency.<sup>8</sup>

Certain aspects of the Commission's Order in Docket 87-5 are particularly relevant to the instant proceeding, including: (i) the flexibility established by the Commission in its rules vis-a-vis the accommodation of wider bandwidth requirements beyond the 12.5 kHz bandwidth standard established therein; and (ii) the authority granted to 25 kHz licensees to split their existing channels, if possible and upon an appropriate showing of need, in order to increase the efficient use of spectrum.<sup>9</sup>

## II. DISCUSSION

### A. Incumbent Licensees Should Retain Authority To Split Channels

A basic tenet of the Commission's statutory responsibility is the promotion of spectrum efficiency for the benefit of all of the Nation's citizens.<sup>10</sup> This long-standing policy was as part of frequency allocations and licensings long before the era of competitive

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<sup>7</sup> See *Id* at ¶¶ 4-5.

<sup>8</sup> See, e.g., *Id*.

<sup>9</sup> See *Id* at ¶ 23.

<sup>10</sup> 47 U.S.C. §§ 151, 301.

bidding and, more specifically, was central to the Commission's determination in PR Docket 87-5.<sup>11</sup>

It was during that comprehensive review, and in view of the advancement of technology and an increase in demand for MAS frequencies, the Commission determined it would be appropriate to reduce standard bandwidth for MAS frequencies from the then standard of 25 kHz to a new standard of 12.5 kHz. In doing so, however, the Commission made clear, indeed, encouraged 25 kHz licensees to split channels as necessary in order to promote spectrum efficiency, and modified its rules to classify such channel splitting as a minor modification of an existing license.<sup>12</sup>

As a MAS licensee, and one with more than fifty percent of its licensed MAS frequencies at 25 kHz, EBMUD believes it essential to retain the right, where its operational needs dictate, to split channels in order to increase its internal and publicly mandated efficiencies while, simultaneously, promoting the broad regulatory goal of maximizing spectrum efficiency.

For these reasons, and without regard to any determinations the Commission may reach in this proceeding – either with respect to frequency classifications (i.e., presumptively subscriber-based v. private use) or competitive bidding in the 932/941 and 928/959 MHz bands – EBMUD urges the Commission to leave undisturbed the flexibility and authority

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at ¶ 23.

to split channels as may be necessary in order to promote the efficient use of its licensed spectrum.

B. Geographic Licensing And Protection Of Incumbent Licensees

The Commission notes that it allocated additional spectrum in the 932-932.5 and 941-941.5 bands in 1989 for both Federal Government and non-Governmental point-to-multipoint use. Between January and February, 1992, during a five day filing window for new applications – to be filed on a first-come, first-served basis – more than 50,000 applications were filed. Where mutually exclusive applications were filed, the Commission indicated it would employ lotteries to select among the mutually exclusive applicants.

With the passage of its auction authority under OBRA, and the subsequent development of rules and procedures governing license auctions, the Commission, as a matter of course, routinely examines radio services to determine whether a contemplated licensing is or should be subject to competitive bidding. Indeed, POFM MAS was subjected to a preliminary examination as a part of the Commission's initial inquiry into its Competitive Bidding Rules, and it was determined therein that POFM MAS was ineligible for competitive bids.<sup>13</sup>

The Commission has now concluded, based on an internal audit, that over 95% of the 50,000 applications (filed during the 1992 five day window) propose some type of

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<sup>13</sup> NPRM at ¶ 7.

subscriber-based service. Since the licenses are proposed to be used principally for compensation, the Commission proposes they will be licensed under its Competitive Bidding Rules.

As it has done in, among others, Narrowband and Broadband PCS licensing, and as it proposes in Wireless Communications Service auctions (2305-2320/2345-2360 MHz bands) and the LMDS auctions (28 GHz band), the Commission has developed service areas as part of the licensing process.

In the instant proceeding, it proposes that licenses subject to auction, specifically those in the 932/941 and 928/959 MHz, would be bid out by Economic Area ("EA").<sup>14</sup> With particular regard to the 928/959 band, the Commission expresses concern about the impact geographic licensing there may have on incumbent licensees in the 928/952/956 MHz bands. This is also an area of particular concern for EBMUD.

Under the proposal, incumbent licensees would continue to operate under existing licenses, i.e., on a non geographical basis. New licensees would be required to provide protection to all co-channel systems under mileage separation requirements, and through a proposed authorization of incumbent licensees to build-out within their authorized license areas to cover "dead spots". Additionally, the Commission suggests EA licensees could negotiate alternative arrangements with incumbent licensees, presumably where there is objectionable interference.<sup>15</sup>

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<sup>14</sup> NPRM at ¶ 16.

<sup>15</sup> NPRM at ¶ 19, n. 2.

The NPRM does not address certain critical considerations EBMUD believes must be resolved before it can offer an informed opinion regarding the question of whether 928/952/956 licenses should continue on a site-by-site basis or be converted over to geographic licenses. In particular, what period of time, if any, is an incumbent licensee required to notify the Commission of an intent to build-out within its license area; and is there a period within which an incumbent licensee will be required to either commence or complete a build-out? EBMUD has some observations regarding these unresolved areas, along with recommendations for providing additional and appropriate protection for incumbent licensees.

First, internal budgeting requirements and timelines associated with funding future build projects make it exceedingly difficult to predict, with any degree of certainty, when funding will be in place to adequately underwrite a contemplated capital build. Second, even if one could predict with certainty, there is little guarantee that other events will not overtake any planned schedule.

Because of the inherent uncertainty, EBMUD believes the most appropriate approach for resolving these matters is to: (i) define the incumbent's present license area as one including the 25-mile separation requirement now contained in the Commission's rules – thus any geographic license and licensee would be restricted by such additional 25-mile adjacent spacing for incumbents; and (ii) determine that the right to build-out within the defined area is for an indefinite period. EBMUD submits such an approach addresses the issue of uncertainty, and affords additional and necessary protection for incumbent licensees.



### C. Competitive Bidding

Authority to select licensees through competitive bidding was conferred upon the Commission in Section 309(j) of OBRA.<sup>16</sup> As the Commission correctly states, auctions are permitted where applications are mutually exclusive and, as further determined by the Commission, where subscriber-based services are involved. While implementing procedures in its Competitive Bidding Docket, the Commission determined that POFM MAS "... was exempt from competitive bidding because the principal use of the spectrum is for non-subscriber services."<sup>17</sup>

Although EBMUD offers no present position with regard to whether it is appropriate to conclude presumptively that bands 932/941 and 928/959 are properly classifiable as subscriber-based,<sup>18</sup> EBMUD does urge the Commission to reaffirm its earlier conclusion that bands 928/952/956 are used primarily for internal communications needs and, as such, are exempt from competitive bids.

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<sup>16</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5599, ¶ 153; see *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391; see also 47 U.S.C. § 309(j)(3) (establishing objectives the Commission must consider in promulgating competitive rules).

<sup>17</sup> NPRM at ¶ 7.

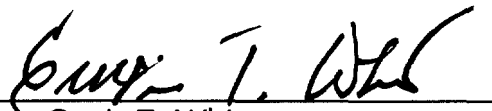
<sup>18</sup> Although the Commission has conducted an internal audit of applications filed during the 1992 five-day filing window and, as a result, concluded that bands 932/941 and 928/959 will be used primarily for profit, some existing (or potential) applicants may have different perceptions regarding the use they may envision for these frequencies. For this reason, EBMUD has determined it will reserve any comments on this matter, if at all, for its Reply Comments.

C. CONCLUSION

WHEREFORE, the premises considered, EBMUD urges the Commission to consider and adopt its foregoing recommendations.

Respectfully submitted,

East Bay Municipal Utility District

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